(2)

No. 91-1930

MOTION FILED
OCT 22 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Does a federal district court have jurisdiction to stay the execution of a state death penalty judgment prior to the filling of a habeas corpus petition?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that the Anti-Injunction Act prohibits stays of execution of state criminal judgments except as authorized by 28 U. S. C. § 2251. That section only authorizes a stay when habeas corpus proceedings are "pending." Proceedings are pending only after the petition is filed.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate

in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The federal district courts in California have needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. The pre-filing stay of execution is one tool that the district courts have used for the inexcusable delays. See App. Pet. Cert., Appendix D. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1992

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Table of authorities vii

Brief amicus curiae 1

Summary of facts and case 1

Summary of argument 2

Argument 2

I

Section 2251 is the sole authority for staying a state execution 3

A. The Anti-Injunction Act 3

B. The All-Writs Act 7

1. *Dean Foods* 7

2. Supreme Court stays 8

II

The application for stay and counsel cannot be "deemed" to be a petition 10

III

A proceeding is "pending" under § 2251 when the petition is filed and not before 13

A. Civil cases generally 14

B. Habeas corpus cases 15

IV

Practical alternatives exist 18

V

Demosthenes v. *Baal* accurately summarizes the controlling principles 20

Conclusion 20

TABLE OF AUTHORITIES

Cases

Amalgamated Clothing Workers of America v. Richman Bros., 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452 (1955) 4

Antone v. Dugger, 465 U. S. 200, 79 L. Ed. 2d 147, 104 S. Ct. 962 (1984) 19

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U. S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) 4, 9, 18

Baldwin County Welcome Center v. Brown, 466 U. S. 147, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984) 10, 11, 15, 19

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 13, 15, 17

Bounds v. Smith, 430 U. S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977) 15, 16

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 12

Brown v. Vasquez, 743 F. Supp. 729 (C.D. Cal. 1990) 2, 3, 5, 8, 15

Brown v. Vasquez, 952 F. 2d 1164 (CA9 1991) 2, 3, 16, 18, 19

Coleman v. Thompson, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 18

Continental Illinois National Bank v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595 (1935) 8

Demosthenes v. Baal, 495 U. S. 731, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990) 7, 13, 20

Estelle v. McGuire, 116 L. Ed. 2d 385,
112 S. Ct. 475 (1991) 15, 17

Ex parte Kearney, 7 Wheat. (20 U. S.) 38,
5 L. Ed. 391 (1822) 18

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 18

Frazier v. Heebe, 482 U. S. 641, 96 L. Ed. 2d 557,
107 S. Ct. 2607 (1987) 13

FTC v. Dean Foods Co., 384 U. S. 597,
16 L. Ed. 2d 802, 86 S. Ct. 1738 (1966) 7, 8

Hallstrom v. Tillamook County, 493 U. S. 20,
107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) 13

Hill v. Lockhart, 474 U. S. 52, 88 L. Ed. 2d 203,
106 S. Ct. 366 (1985) 13

Hill v. Martin, 296 U. S. 393, 80 L. Ed. 293,
56 S. Ct. 278 (1935) 4

Holiday v. Johnston, 313 U. S. 342, 85 L. Ed. 1392,
61 S. Ct. 1015 (1941) 12

Horton v. California, 496 U. S. 128, 110 L. Ed. 2d 112,
110 S. Ct. 2301 (1990) 7

In re Blodgett, 116 L. Ed. 2d 669,
112 S. Ct. 674 (1992) 17

In re Connaway, 178 U. S. 421, 44 L. Ed. 1134,
20 S. Ct. 951 (1900) 14, 15

Juidice v. Vail, 430 U. S. 327, 51 L. Ed. 2d 376,
97 S. Ct. 1211 (1977) 4

Kline v. Burke Construction Co., 260 U. S. 226,
67 L. Ed. 226, 43 S. Ct. 79 (1922) 5, 8

Lewis v. Jeffers, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 15, 17

Looney v. Eastern Texas R. Co., 247 U. S. 214,
62 L. Ed. 1084, 38 S. Ct. 460 (1918) 5

McCleskey v. Zant, 113 L. Ed. 2d 517,
111 S. Ct. 1454 (1991) 19

Parsons Steel, Inc. v. First Alabama Bank,
474 U. S. 518, 88 L. Ed. 2d 877,
106 S. Ct. 768 (1986) 5

People v. Gonzalez, 51 Cal. 3d 1179, 276 Cal. Rptr. 62,
800 P. 2d 1159 (1990) 18

People v. Thompson, 50 Cal. 3d 134, 266 Cal. Rptr. 309,
785 P. 2d 857 (1990) 1

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 19

Ross v. Moffitt, 417 U. S. 600, 41 L. Ed. 2d 341,
94 S. Ct. 2437 (1974) 16

Southern R. Co. v. Painter, 314 U. S. 155,
86 L. Ed. 116, 62 S. Ct. 154 (1941) 5

Studebaker Corp. v. Gittlin, 360 F. 2d 692
(CA2 1966) 10

Sumner v. Mata, 455 U. S. 591, 71 L. Ed. 2d 480,
102 S. Ct. 1303 (1982) 15

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 17

Toucey v. New York Life Ins. Co., 314 U. S. 118,
86 L. Ed. 100, 62 S. Ct. 139 (1941) 5

Vendo Co. v. Lektro-Vend Corp., 433 U. S. 623,
53 L. Ed. 2d 1009, 97 S. Ct. 2881 (1977) 6

Whitmore v. Arkansas, 495 U. S. 149,
109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) 12

Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U. S. 411, 13 L. Ed. 2d 386, 85 S. Ct. 551 (1965) 8

Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 4, 7

United States Statutes

18 U. S. C. § 3006A(a)(2) 19

28 U. S. C. § 1257 8

28 U. S. C. § 1651(a) 3, 7

28 U. S. C. § 2101(f) 9

28 U. S. C. § 2241 11

28 U. S. C. § 2242 12

28 U. S. C. § 2243 17

28 U. S. C. § 2251 . . . . . 2, 3, 5, 19

28 U. S. C. § 2283 3

42 U. S. C. § 2000e-5(f)(1) 19

Pub. L. No. 80-773, 62 Stat. 961-962, 966 (1948) 9

Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976) 11

California Statutes

Cal. Penal Code § 1193 18

Cal. Penal Code § 1239(b) 16

Federal Rules of Court

Federal Rules of Civil Procedure, Rule 3 . . . . . 10, 16

Rule 8 . . . 10, 11, 12

Rule 11 12

Rules Governing Section 2254 Cases in the United States District Courts, Rule 2 . . . . . 11, 12

Rule 4 17

Rule 11 16

Rules of the Supreme Court, Rule 13.1 18

California Rules of Court

Supreme Court Policies Regarding Cases Arising from Judgments of Death, Deering's Cal. Codes, 2 Rules of Court 262-265 (1992 Supp.) 16, 18

Treatises

J. Liebman, *Federal Habeas Corpus Practice and Procedure* (1988) 12, 13, 14

J. Moore & J. Lucas, *Moore's Federal Practice* (2nd ed. 1991) 14

Miscellaneous

Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts 12, 17

L. Powell, et al., Ad Hoc Committee on Federal Habeas Corpus in Capital Cases: Committee Report and Proposal (1989) 17, 19

Revision Note to 28 U. S. C. § 2283 . . . . . 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

On August 25, 1981, Robert Thompson forcibly sodomized and strangled Benjamin Brenneman, a 12-year-old newspaper carrier. *People* v. *Thompson*, 50 Cal.3d 134, 148, 785 P. 2d 857 (1990). Thompson was convicted of the murder and sentenced to death. On February 8, 1990, the California Supreme Court unanimously affirmed the conviction and sentence. *Id.*, at 187-188. On March 29, 1990, the California Supreme Court denied his petition for rehearing in an unpublished order.

On October 1, 1990, this Court denied Thompson's certiorari petition. On October 30, 1990, the Orange County Superior Court set an execution date of December 28, 1990.

On December 5, 1990, Thompson filed in federal district court a request for counsel and a stay of execution.

The request stated that he intended to file a habeas corpus petition with the District Court that would raise constitutional errors. The District Court issued a 45-day stay. The District Court granted two 30-day extensions of the stay, and on March 21, 1991, appointed counsel for Thompson. On March 28, 1991, the District Court denied the Attorney General's motion to vacate the stay of execution. The Ninth Circuit affirmed the District Court in an unpublished memorandum opinion, citing its decision in *Brown* v. *Vasquez*. The Attorney General has filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Anti-Injunction Act is a strict prohibition of federal interference with state court proceedings, subject only to a few narrowly construed exceptions. No exception other than 28 U. S. C. § 2251 applies to habeas corpus.

A case is not "pending" within the meaning of section 2251 until a petition is filed. A document which does not meet the minimal showing required by statute and rule cannot be "deemed" to be a petition.

Although not essential to a jurisdictional analysis, it is worth noting that practical alternatives to pre-filing stays exist. Potential petitioners can apply for counsel immediately upon exhaustion of state remedies. Prompt application will provide counsel sufficient time to place all exhausted claims in petition form and obtain a stay.

ARGUMENT

In the case below the Ninth Circuit relied upon its prior decision in *Brown* v. *Vasquez*, 952 F. 2d 1164 (1991) to uphold pre-habeas stays of execution. Therefore, this decision and the District Court's decision in the same case, see *Brown* v. *Vasquez*, 743 F. Supp. 729 (1990), will be the focus of the analysis. This Court's denial of certiorari in *Brown* should not preclude certiorari for the

present case. Brown had filed a habeas petition before the Ninth Circuit affirmed the stay, raising a mootness question. The present case does not have this problem, as Thompson has not yet filed a habeas petition.

In *Brown*, the District Court found that it had authority to issue a stay independently of the habeas stay provision, 28 U. S. C. § 2251, basing its decision on the All-Writs Act, 28 U. S. C. § 1651(a). *Brown* v. *Vasquez*, 743 F. Supp. 729, 731 (C.D. Cal. 1990). The District Court did not even mention the Anti-Injunction Act, 28 U. S. C. § 2283.[1]

Apparently recognizing the flaw in the District Court's position, the Court of Appeals in *Brown* instead construed section 2251 to authorize a stay before a petition is filed. The Court of Appeals notes, correctly, that section 2251 is an exception to the Anti-Injunction Act. 952 F. 2d, at 1169. Neither the state nor *amicus* says that it is not. The sole question on this approach is whether section 2251 applies prior to the filing of a petition.

Part I of this brief addresses the theory that power to stay exists independently of section 2251. Part II examines the contention that papers filed prior to the actual petition can be "deemed" to be a petition for the purpose of issuing a stay. Part III examines the *Brown* court's theory that section 2251 authorizes pre-filing stays.

I. Section 2251 is the sole authority for staying a state execution.

A. The Anti-Injunction Act.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283. Execution of judgment

---

1. In the present case, Thompson made a similar argument to the Ninth Circuit. See Appellee's Brief at 6-25.

is a state court proceeding within the meaning of this section. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935).[2]

This Congressional command is fundamentally different from judicially created doctrines of abstention, such as *Younger* v. *Harris*, 401 U. S. 37 (1971). "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a *clear-cut prohibition* qualified only by specifically defined exceptions." *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U. S. 511, 515-516 (1955) (emphasis added).

This Court has strictly enforced the Act and narrowly construed the exceptions. "On its face, the present Act is an *absolute prohibition* against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 286 (1970) (emphasis added).

In *Atlantic Coast Line*, the respondents "intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts." *Ibid.* The Court emphatically rejected that contention and held

> "that any injunction against state court proceedings otherwise proper under general equitable principles *must* be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, *the exceptions should not be enlarged by loose statutory construction.*" *Id.*, at 287 (emphasis added).

The essence of the District Court's opinion in *Brown* is that a federal court can stay state proceedings "if it is necessary to preserve [the federal] court's *potential*

---

2. *Hill* is a civil case, but the principles underlying the Anti-Injunction Act apply with greater, not lesser, force in criminal cases. See *Juidice* v. *Vail*, 430 U. S. 327, 335 (1977).

jurisdiction." 743 F. Supp., at 317 (emphasis added). There is no such exception to the Anti-Injunction Act.

The page limit on this brief does not permit an extended discussion of the history of the Anti-Injunction Act. One is contained in our brief in the Court of Appeals in the present case. Briefly, however, there are only three exceptions in the Act. They are (1) exceptions expressly created by Congress, (2) injunctions "in aid of [the federal court's] jurisdiction," and (3) injunctions "to protect or effectuate its judgments."

The express exception is, of course, 28 U. S. C. § 2251, which is discussed in part III, *post*. The third exception is clearly inapplicable, because there is no judgment to protect or effectuate.[3]

This leaves the "aid of jurisdiction" exception. Where an action is *in rem* and the federal court has *first* acquired jurisdiction of the *res*, this exception authorizes the court to prevent state court interference. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229 (1922). It authorizes a federal court which has already issued an injunction in a case within its jurisdiction to enjoin the issuance of later, contrary injunctions by state courts. *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221 (1918). It also authorizes "federal courts to stay proceedings in State cases removed to the district courts." Revision Note to 28 U. S. C. § 2283, at 445 (1988 ed.)

The exception definitely does not authorize a federal court to stay a state action merely to insure that the controversy will be determined in federal court rather than state court. This rule was recognized in *Kline*, *supra*, 260 U. S., at 232. It was reiterated by a unanimous Court, including the *Toucey* dissenters, in *Southern R. Co.* v. *Painter*, 314 U. S. 155 (1941). The 1948 revision expressly

---

3. This exception was added in 1948 to overrule *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941) and adopt the view of the dissent in that case. See *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 524 (1986). It authorizes a federal court to prevent relitigation in state court of issues already determined in federal court. See *Toucey*, at 152-153 (Reed, J., dissenting).

restored the law "as generally understood and interpreted prior to the Toucey decision." Revision Note, *supra*.

Vendo Co. v. *Lektro-Vend Corp.*, 433 U. S. 623 (1977) refutes the notion that a federal court has carte blanche authority to preserve the status quo against state court action. The parties in that case had filed breach of contract and antitrust suits in state and federal court, respectively. *Id.*, at 627. Vendo eventually received a judgment in state court of over seven million dollars, *id.*, at 628, enough to take control of both corporate defendants, *id.*, at 641.

The Federal District Court enjoined execution of the state judgment, relying on two independent bases of jurisdiction. First, the court believed that the injunction section of the Clayton Act was an express exception to the Anti-Injunction Act. Second, the court "found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to § 2283." *Id.*, at 629.

Five Justices explicitly rejected the antitrust ground of jurisdiction on the facts before the Court. The majority was divided on the question of whether the Clayton Act could be an exception under other circumstances, however. *Id.*, at 640-641 (plurality opinion of Rehnquist, J.); *id.*, at 643 (Blackmun, J., concurring in the result).

On the second ground, the plurality relied on *Kline*, *supra*, and emphatically rejected the notion that preservation of the "case or controversy" constitutes an exception to the Anti-Injunction Act. "No case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception; neither have the parties directed us to any other federal court decisions so holding." *Id.*, at 642.[4]

The concurring Justices expressed no disagreement with the plurality's analysis on the "aid of jurisdiction"

---

4. The plurality also held that the factual basis for the District Court's holding was flawed. *Ibid.*

point, which was necessary to the judgment in which they concurred. *Vendo* can therefore be considered a majority holding on this point. Cf. *Horton* v. *California*, 496 U. S. 128, 136 (1990) (statement in plurality opinion not binding because unnecessary).

In summary, the Anti-Injunction Act is an absolute prohibition, not a discretionary admonition. The rule is broadly construed, and the exceptions are narrowly construed. The "aid of jurisdiction" exception is limited to its historical functions of enforcing the removal statutes, implementing previously entered decrees in pending cases, and retaining possession of the *res* in proceedings *in rem*. The only change in the 1948 revision was to overrule *Toucey* and authorize the federal courts to *prevent* relitigation of issues they had already decided. *Kline*, *Painter*, and *Vendo* establish that there is no general exception to preserve a controversy for federal adjudication.

B. The All-Writs Act.

1. Dean Foods.

The District Court in *Brown* based its jurisdiction on the All-Writs Act, 28 U. S. C. § 1651(a) and *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). *Dean Foods* is distinguishable on several grounds.

First and foremost, *Dean Foods* did not involve any legislative prohibition on injunctive relief. It was a pure case of searching for authority in the absence of any clear indication from Congress one way or the other. See *id.*, at 608. The difference between that type of case and one involving a prohibition on injunctions is critical.

A related distinction, and one nearly as important, is that *Dean Foods* does not involve the delicate relationship between state and federal courts. Federal injunction of state proceedings is a grave step, never to be taken lightly. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 41, 43 (1971); *Demosthenes* v. *Baal*, 495 U. S. 731, 737 (1990).

Finally, *Dean Foods* involved a writ issued by an appellate court in a case which had already entered the federal adjudicatory process. The case was pending before

the Federal Trade Commission. 384 U. S., at 599. *Dean Foods* cited as authority cases in which appellate courts had issued orders in cases pending in the lower courts, which would later be appealed. *Id.*, at 603.

The District Court in *Brown* stated that *Dean Foods* is authority for pre-filing stays because the injunction issued before "the initial entry of [the] action into the *Article III* court system." 743 F. Supp., at 731 (emphasis added). There is nothing in *Dean Foods* or the authorities on which it relies to justify this distinction between Article I and Article III adjudicatory bodies.

The principal case relied on by *Dean Foods* is *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411 (1965). See *Dean Foods*, 384 U. S., at 604. *Whitney* is a ringing affirmation of the legitimacy and the wisdom of Congress's choice to substitute an administrative body in the place of the district court in certain specialized areas. *Whitney*, 379 U. S., at 420-421. *Dean Foods*, 384 U. S., at 604, also relies on *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). That case, in turn, relies on the *Kline* v. *Burke Construction*, *supra*, for the proposition that "a federal court, *having first acquired jurisdiction* of the subject matter, could enjoin the parties . . . . " 294 U. S., at 675 (emphasis added). Where it is the *state* courts who have *first* acquired jurisdiction, *Dean Foods* provides no authority for a general power to enjoin them. Indeed, the District Court's interpretation of *Dean Foods* would amount to a judicial repeal of the Anti-Injunction Act.

2. Supreme Court stays.

The District Court in *Brown* noted that the Supreme Court and its Justices can and do issue stays of state court proceedings in cases where the certiorari petition has not yet been filed. *Brown* v. *Vasquez*, *supra*, 743 F. Supp., at 731, n. 8 (citing *California* v. *Velasquez*, 445 U. S. 1301 (1980) (Rehnquist, J., in chambers)). Contrary to the District Court's reasoning, this power and its source refute the existence of a similar power in district courts.

The Supreme Court is unique among federal courts. This Court alone has appellate jurisdiction over cases arising in the state courts. 28 U. S. C. § 1257. This unique jurisdiction calls for a unique power regarding stays, see *Atlantic Coast Line, supra*, 398 U. S., at 296, and Congress has provided one in 28 U. S. C. § 2101(f):

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . . "

The contrast between the wording of this statute and the wording of section 2251 is striking and significant. The Supreme Court may grant stays in cases merely "subject to review," but the district court on habeas corpus is limited to granting stays when a "proceeding is pending" before that court. Both provisions were adopted in the same act: the 1948 revision of Title 28. See Pub. L. No. 80-773, 62 Stat. 961-962, 966.

Congress knows how to unambiguously authorize pre-filing stays when it deems them necessary. The staying of state court action in a case which has not yet entered the federal system is a grave step. Congress has seen fit to allocate such power to this Court alone.

Supreme Court practice thus provides no authority for a comparable power in the district court. This Court's stay power derives from a special statute. Congress has conferred a unique power on the Supreme Court in order to discharge its unique responsibilities. Congress has also conferred a stay power on the federal habeas court, but that power is worded differently. The difference is intentional.

II. The application for stay and counsel cannot be "deemed" to be a petition.

Thompson argued in the court below that a habeas proceeding was "pending" upon the filing of the request for stay and counsel because that document could be "deemed" a habeas petition under the District Court's local rules is meritless. Appellee's Brief at 34-35. *Amicus* has found only one case supporting such an exercise, and the situation there was quite different. In *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (CA2 1966), the court held a hearing before the complaint was filed, but it issued the injunction afterwards. *Id.*, at 694. Under the facts of the case, *Studebaker* is authority for no more than the proposition that a court may deem an extensive affidavit, which contains the information required in a complaint, to be a complaint *for the purpose of holding a hearing* on whether to grant an injunction. Whether an injunction can actually issue without an actual complaint is another question.

A Supreme Court case closer to the present facts points in the opposite direction. In *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984), would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission (EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

This Court held that the EEOC letter could not be deemed a complaint. The Court noted that under Federal Rule of Civil Procedure 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 *because there was no statement in the letter of the factual basis for the claim of discrimination, which is*

required by the Rule." *Id*., at 149 (emphasis added). Upholding this ruling, this Court rejected the Court of Appeals' notion that civil rights plaintiffs were somehow exempt out of a special solicitude for this class of plaintiffs. *Id*., at 149-150.

The complaint later filed, the Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [Citations.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id*., at 150, n. 3 (emphasis added).

Baldwin County holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading. A mere application for counsel, or even counsel's statement of "nonfrivolous" issues, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by Rule 8 of the Federal Rules of Civil Procedure ("Civil Rules") but rather by 28 U. S. C. § 2241 and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). The Habeas Rules are an Act of Congress. Although originally promulgated by the Supreme Court, see 425 U. S. 1169, they were amended by Congress and approved as amended. See Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976).

In the Court of Appeals, Thompson attacked the state's argument that a petition must allege facts supporting a claim for relief. Such an argument, Thompson said, urges the court to usurp the legislative function. Appellee's Brief 33. This argument is precisely backwards. By

approving Habeas Rule 2(c), Congress has explicitly required that the petition "shall specify all the grounds for relief . . . and shall set forth in summary form the facts supporting each of the grounds thus specified." How clear must Congress be? Judicial disregard of this clear legislative requirement would usurp the legislative function.

It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. Civil Rule 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury, Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid*. The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 163-164 (1990).

More importantly, section 2242 and Habeas Rule 2(c) retain "fact pleading" rather than the "notice pleading" of Civil Rule 8. " '[N]otice pleading' is not sufficient, for the petition is expected to state facts that point to a '*real possibility of constitutional error*.' See *Aubut* v. *State of Maine*, 431 F. 2d 688, 689 (1st Cir. 1970)." Advisory Committee Note to Habeas Rule 4 (emphasis added); see also 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.4, at 149 (1988). Even Professor Liebman, who calls this requirement "curious," *ibid*., and "anomalous," *id*., at 149, n. 3, grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is in fact designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from

insubstantial ones quickly and without need of adversary proceedings." *Ibid*.

The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id*., at 62 (White, J., concurring). If the factual basis of the claim has already been decided in a state proceeding entitled to deference, it is error to grant a stay. *Demosthenes* v. *Baal*, 495 U. S. 731, 737 (1990).

Barefoot v. *Estelle*, 463 U. S. 880, 894 (1983) established that "it is entirely appropriate that an appeal which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay." Absent an unresolved and constitutionally significant factual issue, consideration of the petition by the district court is no different.

There is an irreducible minimum below which a paper cannot be deemed a petition. It must be verified or signed under penalty of perjury. It must be signed by the petitioner absent extraordinary circumstances. Most importantly, it must serve the basic function of identifying the claims and their factual basis. The papers on file at the time the District Court granted the stay in the present case did not meet this essential requirement. The local rulemaking authority does not include the power to contradict the habeas statutes and rules. See *Frazier* v. *Heebe*, 482 U. S. 641, 646 and n. 4 (1987). The local rules, therefore, cannot permit these papers to be "deemed" a petition.

III. A proceeding is "pending" under § 2251 when the petition is filed and not before.

The crux of this case is when a habeas corpus proceeding is "pending." Authority on the question is sparse, simply because very few litigants have had the effrontery to ask a court for relief before they have filed a complaint. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 30 (1989)

(assuming courts precluded from granting TRO before complaint filed). What little authority exists, however, is uniformly against the *Brown* court's conclusion. Even the most partisan of the pro-petitioner commentators states unquestioningly that the petition is a prerequisite to federal jurisdiction as the law now stands. 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.1, at 145 (1988).

A. Civil Cases Generally.

In re Connaway, 178 U. S. 421 (1900) appears to be the only direct authority for when an action begins so as to make it "pending." Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire facias* to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death, because he had not been served. Connaway applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced,* and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[5] By section 405 of the Code of

---

5. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 1.02[1], at 1-5 (2nd ed. 1991).

> Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' . . . *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the Federal Rules of Civil Procedure is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court." The rule of *Connaway* is therefore the rule today in federal civil cases. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 149-150 (1984).

B. Habeas Corpus Cases.

The *Brown* court, presented with the clear authority of *Connaway* and *Baldwin County*, nonetheless found that the purpose of habeas corpus permits the federal courts to make an exception to the usual rules and consider a habeas corpus proceeding "pending" as soon as the prospective petitioner asks for counsel. 952 F. 2d, at 1168. The court's analysis is backwards. The differences between habeas corpus and other cases call for stricter requirements for a stay, not more lax requirements.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Ignoring this principle, the Court of Appeals quotes *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977) out of context for the proposition that federal habeas corpus review of state convictions "is, in essence, 'the *first* line of defense against constitutional violations.' " 952 F. 2d, at 1166 (emphasis added). Once again, the Ninth Circuit is acting as if state courts do not exist, despite repeated admonitions by this Court. See, *e.g.*, *Sumner* v. *Mata*, 455 U. S. 591, 597-598 (1982); *Lewis* v. *Jeffers*, 111 L. Ed. 2d 606, 622-623, 110 S. Ct. 3092, 3102 (1990); *Estelle* v.

McGuire, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

In *Bounds*, the prison inmates sought access to a law library in order to prepare a variety of pleadings, which included state collateral proceedings and state and federal civil rights actions, as well as federal habeas. See 430 U. S., at 828, n. 17. In the course of contrasting these actions with discretionary appeals following a first appeal as of right, the *Bounds* Court referred to the group collectively as the "first line of defense." This contrast was necessary to distinguish *Ross* v. *Moffitt*, 417 U. S. 600 (1974), which involved counsel on discretionary appeals. The crucial difference, said *Bounds*, was that in *Moffitt* the prisoners were "likely to have appellate briefs previously written on their behalf, trial transcripts, and often intermediate appellate court opinions to use in preparing petitions for further review." 430 U. S., at 827.

So it is in the present case. Capital defendants in California are provided counsel not only on appeal but also on the state habeas petition. See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Rule 3, Deering's Cal. Codes, 2 Rules of Court 262-265 (1992 Supp.) ("Cal. Supreme Court Policies"). Unlike the brand new cases envisioned by the *Bounds* Court, California capital defendants have the benefit of extensive briefing *and investigation*, *id.*, ¶ 2-2, at 264, by state-paid attorneys followed by comprehensive review by the state's highest court, Cal. Penal Code § 1239(b), before the case ever enters the federal system. The Court of Appeals' discourse about unprepared, *pro se* petitioners, 952 F. 2d, at 1167-1168, inexplicably ignores the great lengths to which California has gone to provide representation.

It is quite true, as the *Brown* court said, that the Federal Rules of Civil Procedure do not apply where they are inconsistent with the Habeas Rules. Habeas Rule 11. But Civil Rule 3 is entirely consistent with both the letter and the spirit of the Habeas Rules.

The people of California have litigated this case to final judgment. The case has been thoroughly reviewed

and affirmed by the highest court of the largest state of the Union. A presumption of finality and legality has attached. *Barefoot*, *supra*, 463 U. S., at 887. The people have a powerful interest in executing their judgment. *In re Blodgett*, 116 L. Ed. 2d 669, 674, 112 S. Ct. 674, 676 (1992). Indeed, enforcement of the law against murder is the single most important function of state government. Congress has authorized the federal courts to delay the enforcement of such judgments, but *only* upon a showing of a "real possibility of constitutional error." Advisory Committee Note to Habeas Rule 4, *supra*. As Rule 4 recognizes, there may not be any substantial federal question. Each of the petitioner's claims may be either (1) not truly federal, see *Estelle* v. *McGuire*, *supra*, 116 L. Ed. 2d, at 396, n. 2, 112 S. Ct., at 480; (2) precluded by state court fact-finding, see *Lewis* v. *Jeffers*, *supra*, 111 L. Ed. 2d, at 622-623, 110 S. Ct., at 3102; (3) proposals for "new rules" precluded by *Teague* v. *Lane*, 489 U. S. 288 (1989); or (4) simply insubstantial.

The rule of *Connaway*, *Baldwin County*, and Civil Rule 3 that a proceeding is commenced only upon the filing of a complaint/petition is fully consistent with the procedure for preliminary review set forth in Habeas Rules 2 and 4. These rules contemplate a screening process to summarily dispose of meritless petitions. See also 28 U. S. C. § 2243, para. 8. The clear import of these rules is that the state is entitled to proceed with the execution of its judgment absent a showing of a "real possibility of constitutional error." That cannot be done if stays are issued without any showing at all.

Arguments have been made for an automatic stay on the first habeas petition in capital cases. See, *e.g.*, L. Powell, et al., Ad Hoc Committee on Federal Habeas Corpus in Capital Cases: Committee Report and Proposal 7 (1989) ("Powell Committee Report"). Congress has not yet seen fit to adopt these proposals. The Congressional mandate that the state has a right to proceed with its judgment in the absence of a substantial claim remains in force. Unless the defendant is required to file his petition

before obtaining a stay, there is no way to carry out that mandate.

IV. Practical alternatives exist.

Although fundamental principles of federal jurisdiction uniformly point to a lack of jurisdiction, the Ninth Circuit attempts to justify its policy of granting these stays with the dire prospect of a capital defendant being executed before his first federal petition could be filed. 952 F. 2d, at 1168-1169. Jurisdictional questions do not require practical answers, not even in habeas cases. *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 45 (1822); see also *Atlantic Coast Line*, *supra*, 398 U. S., at 294. Nonetheless, it is worth noting that with reasonable diligence on the part of the habeas petitioner and his attorney, the problem raised by the court below is readily avoidable.

The California Supreme Court routinely grants stays of execution pending certiorari to this Court. See Cal. Supreme Court Policies, *supra* p. 16, Rule 1, at 262-263.[6] Certiorari is not required for exhaustion, however. *Fay* v. *Noia*, 372 U. S. 391, 435 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Work on the habeas petition can begin immediately. Counsel has three months to file the certiorari petition, Supreme Court Rule 13.1, and this Court typically takes several months to rule on it. The initial setting of an execution date then takes at least 60 days, usually 90. Cal. Penal Code § 1193. Thus, an inmate who applies for counsel promptly upon exhaustion of state remedies will have the better part of a year to

---

6. Under the system of unified review adopted while Thompson's case was on appeal, the state habeas petition is filed in the Supreme Court after the direct appeal reply brief but before argument. Cal. Supreme Court Policies, *supra* p. 16, Rule 3 ¶ 1-1.1, at 263. The petition is dismissed before decision of the appeal if it is insubstantial or consolidated with the appeal if it is substantial. See, *e.g.*, *People* v. *Gonzalez*, 51 Cal. 3d 1179, 1240, 800 P. 2d 1159 (1990). State remedies are thus exhausted upon decision of the direct appeal.

obtain counsel and file the petition.[7] Cf. Powell Committee Report, *supra*, at 6 (six months sufficient).

The Court of Appeals made much of the rule of *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) in holding that pre-filing stays are necessary. See 952 F. 2d, at 1166-1167. This reliance is misplaced. It ignores the very substantial resources the state has already provided for investigation of potential claims. See *ante*, at 16. Federal habeas counsel need not investigate the case from scratch, but only review and supplement a completed investigation. See, *e.g.*, *Antone* v. *Dugger*, 465 U. S. 200, 206 (1984) (claim readily available in state pleadings).

Rose v. *Lundy*, 455 U. S. 509, 520 (1982) "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Before a death row inmate ever gets to federal habeas, California has provided him with the forum, the counsel, and the investigative resources to comply with that direction. The cards should all be on the table by this point.

It is ironic indeed that while the district courts in all the other states with capital punishment discharge their duties without pre-filing stays, the rule in question here has been adopted in the state where it is least necessary. The time available to the diligent petitioner is sufficient, given the extensive state review and the "secondary and limited" role of federal habeas corpus. In addition to being illegal, the rule purporting to authorize a pre-filing stay is unnecessary.

---

7. There is no inconsistency in permitting a court to consider motions to appoint counsel or proceed *in forma pauperis* before the "commencement" of a proceeding. See *Baldwin County*, *supra*, 466 U. S., at 148; 42 U. S. C. § 2000e-5(f)(1). Such motions impact only the court and the treasury, not the rights of the adverse party. Compare 28 U. S. C. § 2251 ("proceeding is pending") with 18 U. S. C. § 3006A(a)(2) ("person who . . . is seeking relief").

V. *Demosthenes* v. *Baal* accurately summarizes the controlling principles.

Demosthenes v. *Baal*, 495 U. S. 731 (1990) states that "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances." *Id.*, at 737. Although no citation is given, this is a statement of the fundamental principle established by the authorities in part I, *supra*. The Anti-Injunction Act bars federal interference absent an exception, and section 2251 is the only relevant exception.

"Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." *Ibid.*

CONCLUSION

The judgment of the Court of Appeals should be summarily reversed.

October, 1992

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation